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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/014,364	12/11/2001	Raul Victorino Nunes	8625	1135

27752 7590 08/29/2003

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EXAMINER
PRATT, HELEN F

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 08/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/014,364	NUNES ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____ .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-23* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-23* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 10/014377. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims are broader than that of the '377 application and are within the embodiment of claims 1 and 10 of the instant application and show the composition of claims 22, and 23.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barey (5,866,190) or Young et al. (2002/0160086 A1).

Barey discloses a process of making a drink by combining pectin and aginates with sugar (enhancer), then an acid is added in the form of fruit juice and citric acid and then the mixture is packaged (abstract and col. 6, lines 30-45). Young discloses an acidic based beverage which contains milk proteins (an enhancer), and stabilizers such as pectin and propylene alginate (para 0049—0053). The hydrated stabilizers are added to the milk proteins (enhancer material). Acid can be added after the above mixture is homogenized. Claims 1, 7 and 9 differ from the reference in the step of dispersing the beverage components at a particular range of NP/M or for a particular time. However, nothing new or unobvious is seen in mixing ingredients at particular times or NP/M's absent a showing of unexpected results. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch,

617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a beverage product, which contains suspended particles, processes such as mixing ingredients are important. It appears that the degree of mixing as well as the time of mixing affects the degree of suspension of the particles in the beverage, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. In addition, the reference to Young et al. disclose adding the acid to the homogenized mix with low shear mixing (page 4, para. 0056). No particular degree of mixing is disclosed as claimed, but mixing is seen as being within the skill of the ordinary worker to mix until the desired product is obtained. Therefore, it would have been obvious to mix for whatever time which would keep the enhancing material in suspension, because the reference also shows mixing as in homogenization and it is well known to mix anytime ingredients are added to a mixture in order to incorporate them into the mixture.

Claim 2 further requires that the stabilizer system and liquid be mixed to a particular NP/M and then adding the enhancer to it and later mixing as above and adding acid. However, Barey discloses that it is known to mix together stabilizers before adding other ingredients (col. 6, lines 45-56). As above, particular degrees and times of mixing are seen as being within the skill of the ordinary worker. No data is seen that the product of Barey, in particularly, differs from the claimed process. Therefore, it would have been obvious to mix to particular NP/M's or for various lengths of time.

Claims 3 and 4 further require that the beverage component be dispersed with the second dispersion over a period of time or as in claims 6 and 8 at a particular NP/M.

However, as above, nothing new is mixing ingredients absent a showing of unobvious results. Therefore, it would have been obvious to mix for various lengths of times because this is seen as being within the skill of the ordinary worker.

Claim 5 requires temperatures below 80 C. The reference to Barey does not require a heat treatment (col. 6, lines 45-70). Therefore, it would have been obvious to process without the use of heat.

Claims 10 –21 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Mezzino et al (4,529,613).

Mezzino et al. disclose a cloud system made of a polymeric carrier component, pectin and titanium dioxide (abstract). The titanium dioxide is added to an aqueous solution of maltodextrin and pectin and the suspension is co-dried (col. 6, lines 23-45). The suspension then can be reconstituted with water to make a beverage (col. 8, lines 45-48). Even though Mezzino et al. disclose a dry mix, Mezzino et al. disclose that it is known to add an enhancer as in claim 10 such as the opacifier, titanium dioxide, to pectin before adding it to other materials. The reference discloses that the titanium dioxide will precipitate if only dry mixed with the other ingredients when mixed in a beverage (col. 6, lines 27-45). Therefore, it would have been obvious to use an enhancer such as titanium dioxide in the composition of Barey or Young et al. since it is known that the opacifier, titanium dioxide, will precipitate out of solution, if mixed without forming a complex first.

Claim 11 further requires a particular NP/M of the composition ingredients and claim 12 mixing at a particular temperature. However, as in the discussion of claims 1 and 5, nothing new or unobvious is seen in mixing ingredients when the out come is known, and therefore, mixing to that degree or at a particular temperature.

Claim l3 further requires a highly methylated non-amidated pectin with particular ratios as in part b. Mezzino discloses a high degree of methylation, but not the particular ratio. Nothing is seen at this time that the claimed ratio would not have been as claimed since a highly methylated pectin is disclosed (col. 4, lines 60-70). Therefore, it would have been obvious to use a high degree of methylation in the composition, particularly as Barey also uses a high degree of methylation (col. 3, lines 6-12).

Claim 14 further requires a particular ratio, which is disclosed by Barey in col. 2, lines 29-35). Therefore, it would have been obvious to use ratios within the claimed amount.

The amount of pectin as in claim 15 is disclosed by Barey in col. 3, lines 6-14. Therefore, it would have been obvious to use the claimed amounts.

The limitations of claim 16, 18 -21 have been disclosed above and are obvious for those reasons.

The pH of claim 17 is within the claimed range as in claim 17 of 2-5 (col. 5, lines 19-24). Therefore, it would have been obvious to make a beverage with the claimed pH using the process of Barey.

Claims 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Gobbo et al. or Bunger et al.

The above combined references disclose the composition of the product. Also, Gobbo discloses the use of an acidified tea beverage containing pectin as a stabilizer, water, and an enhancer such as corn syrup, a flavorant or citric acid (col. 9, lines 1-65). Bunger et al. disclose a beverage thickener containing an alginate and other gums as a stabilizing system (abstract). The enhancer is peel oil (col. 8, lines 59-70 and col. 9, lines 1-16. Claims 22 and 23 are also product by process claims. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See In re Thorpe 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See Ex parte Jungfer 18 USPQ 2D 1796. Therefore, it would have been obvious to make a product as shown by the above references.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone

number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651. hp 8-27-03

H. Pratt

HELEN PRATT
PRIMARY EXAMINER